


Jurisdiction to Enjoin a Foreign Website in the EU

Which court has jurisdiction to enjoin a foreign based website to carry on illegal activities in the forum? On November 6, 2008, the French Supreme Court for private and criminal matters (*Cour de cassation*) held that French courts had jurisdiction to enjoin a company incorporated in Malta from carrying on illicit activities through a website, as the site was accessible in France. The decision was made by a chamber of the court which does not usually deal with conflict issues, and that might explain why it did not address, at least expressly, the issue of the foundation of such jurisdiction, and in particular whether European law applied.

In this case, the foreign company was Zeturf Ltd, and was incorporated in  Malta. Zeturf intended to offer online betting on horse races taking place in France. The problem was that the French state has created a special entity to carry on such activity, Pari Mutuel Urbain (PMU), and that it has granted it a legal monopoly since 1891. In other words, any other entity purporting to offer similar services infringes French law. As a consequence, 10 days after Zeturf began its activity in June 2005, PMU sought an interlocutory injunction preventing Zeturf from continuing to infringe French law. As there is no contempt of court in France, PMU asked that the injunction be sanctioned by a financial penalty per day of non-compliance (*astreinte*). On July 8, 2005, the first instance court granted the injunction with a € 8,000 per day penalty. Zeturf appealed.

Then, the procedure got complicated. The injunction was confirmed by the Paris Court of appeal in 2006. Zeturf appealed to the *Cour de cassation*. Meanwhile, PMU sought recovery of the financial penalty. A Paris (first instance) Enforcement court (*Juge de l'exécution*) ordered Zeturf to pay € 915,000 for non complying for a bit more than a month in the fall 2005. Zeturf appealed to the Paris court of appeal (different chamber), and lost again later in 2006. Zeturf appealed to the *Cour de cassation*. It was right to do so. In July 2007, the *Cour de cassation* allowed the first appeal and held that the French monopoly was likely non-compliant with European community law, and that the trial judges ought to reexamine the case in the light of the judgments of the ECJ on that point.

The second appeal was then examined by the *Cour de cassation*. The issue was not anymore whether the injunction should have been granted (most probably not), but whether Zeturf ought to pay the financial penalty for not complying with a (as it deemed to be then) valid injunction. Zeturf challenged the jurisdiction of French courts to make the order for payment of the penalty. It argued that the relevant provision was article 22-5 of the Brussels I Regulation, as *astreinte* was a measure purporting to enforce a judgment, i.e. the injunction. Zeturf further argued that the only court which thus had jurisdiction was the Maltese court, because *astreinte* was an enforcement measure acting in personam, and it could only be enforced where the said person was, that is in Malta.

The *Cour de cassation* dismissed the appeal, and confirmed the penalty. The judgment, however, is disappointing, as the court did not clearly address the issue of the applicable regime. It did not rule that the Regulation governed. Indeed, it seems that it applied implicitly the French law of international jurisdiction. It held that the French court had jurisdiction to decide on the *astreinte* because the domiciled of the debtor was abroad, and the injunction was to be performed in France. And it happens to be that the French statute on the jurisdiction of Enforcement courts precisely provides that such courts have jurisdiction either when the domicile of the debtor is in France, or when the relevant measure is to be enforced in France.

One cannot really see any good reason not to apply the Brussels I regulation in this case. Now, it seems that, if the *Cour de cassation* had, it would have ruled that both the *astreinte* and the injunction were to be performed in France. The reason the judgment gives for this is that the website was accessible from France. Again, not a really convincing argument. The Paris Court of appeal had a better one: it had held that the injunction was to be enforced in France, because the defendant had not demonstrated that the website could not be modified from France.

Another interesting issue was whether the dispute fell at all within the scope of article 22 of the Brussels I Regulation. The injunction was interlocutory. Arguably, it was thus article 31 which applied, in respect of both the issuance of the injunction and the award of the financial penalty.